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No. 95-433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LAURANCE B. WOLFBERG AND CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF

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REPLY BRIEF

Petitioners Laurance B. Wolfberg and Carolyn Wolfberg respectfully submit this reply brief in support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

ARGUMENT

Although Respondent Robert I. Greenberg asserts that "this case bears no resemblance to *BMW*," Opp. at 13, he does not—and, indeed, cannot—dispute that this case raises the same issue as the second question presented in *BMW of North America, Inc.* v. *Gore*, No. 94-896: what standard should govern the review of punitive damage awards for excessiveness under the Due Process Clause? Unable to

argue that the constitutional excessiveness question is not presented by this petition, Respondent instead advances arguments that are irrelevant to the question presented or are simply arguments on the merits of the constitutional excessiveness question.

Respondent argues that the lower courts' review of the award confirms the Tenth Circuit's conclusion "that the Wolfbergs themselves were indeed afforded due process based on the record in this case." Opp. 14. The record, however, reveals that the district court's excessiveness review was limited to only one paragraph, *see* Pet. App. 27a, and that the court of appeals dispatched the issue in only two sentences, *see* Pet. 17a. Such cursory review hardly satisfies the "procedural obligation," suggested by Justice Breyer at the *BMW* oral argument, for courts "to explain some rational theory" justifying the size of a punitive damage award "when there is no obvious relationship between" the amount of punitive damages awarded and the extent of the harm. *See* Transcript of *BMW* Argument at 55. In any event, even if the procedural requirements of due process were met, that would not make the question presented by this petition any less important, because this petition calls upon the Court to set forth the standards for determining whether a particular punitive damage award, as a *substantive* matter, violates due process.

Similarly, Respondent's observation that Oklahoma law, unlike the Oregon statute at issue in *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331 (1994), permits post-verdict review, *see* Opp. 14, does not diminish the need for this Court to grant certiorari so that the *federal* constitutional standard articulated by this Court may be applied in this case.

Respondent devotes much of his brief to restating his version of the "facts" of this case in attempting to convince the Court that the Wolfbergs' constitutional excessiveness claim is unworthy of consideration. The Wolfbergs take strong issue with respondent's characterization of the record, but the issue at this stage of the case is not whether the Wolfbergs committed a wrong, but whether the

multimillion-dollar punishment against them satisfies the Constitution. As this Court observed in *Honda*, "[w]hat we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." 114 S. Ct. at 2339.

Regardless of how respondent mischaracterizes the record in this case,[1] there remain several objective indicia that the $2,250,000 punitive exaction in this case is constitutionally excessive. For example, although respondent cites to noneconomic damages for "emotional distress, anxiety and fear" and "a lost business opportunity," Opp. 10, he does not dispute that his pecuniary damages were only approximately $34,000 in legal fees. *See* Opp. 9-10. Respondent also does not dispute that the punitive damage award in this case far exceeds the amount of punitive damages awarded in any other malicious prosecution or abuse-of-process case decided under Oklahoma law, as well as the maximum statutory fines for analogous conduct. *See* Opp. 18-19.

Apart from these factors, it can hardly be disputed that a serious question of constitutional excessiveness arises from

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[1] For example, quoting Trial Exhibit 44, respondent asserts that "Laurance Wolfberg's directive to his attorneys discloses his intent to remove Greenberg from his position of influence within the family, destroy him emotionally and financially, and 'bring him to his knees' through multi-million dollar judgments." Opp. 2 (quoting Opp. App. 30a). Respondent fails to disclose, however, (and inexplicably fails to reprint in his appendix) the portion of Trial Exhibit 44 in which Mr. Wolfberg instructs his counsel that "I don't wish to have the suit for removal of trustee [filed] unless those skilled in that field can confirm that we could in fact prevail . . . ." Trial Exhibit 44, at 4, *reprinted in* Appellee's Supplemental Appendix at 20.

the ratio of the punitive damage award to the Wolfbergs' wealth. Regardless of which figure the Court considers for the Wolfbergs' net worth,[2] it is clear that the punitive award represents a far larger percentage of the Wolfbergs' net worth in this case than in virtually every other punitive damage case. *Cf. Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) ($25 million punitive damage award excessive where defendant had $9 billion net worth); *Kelley* v. *Sears, Roebuck & Co.*, 882 F.2d 453 (10th Cir. 1989) ($1.25 million punitive damage award excessive where defendant had $12.8 billion net worth); *Spaeth* v. *Union Oil Co. of Calif.*, 762 F.2d 865, 866-67 (10th Cir. 1985) ($3 million punitive damage award excessive where defendant had $3.3 billion net worth). The unusually high ratio of punitive damages to the defendants' net worth warrants particular attention here, given that the defendants are individuals and the plaintiff suffered relatively little harm from their conduct.

The punitive damage award in this case is an unprecedented forced redistribution of millions of dollars from a sister to her brother and from one brother-in-law to another based simply on a family squabble that escalated into civil litigation. These circumstances present a compelling context for application of the constitutional excessiveness standard to be articulated by this Court.

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[2] Although respondent cites evidence that the Wolfbergs' net worth in *1987* stood at $23.5 million, the record shows that their net worth in *1991*—the time of the judgment—was approximately $7.3 million. The Wolfbergs' financial statement from 1991, which was prepared as part of their application for the supersedaes bond, was filed with the district court on November 25, 1991, as an exhibit to Defendants' Reply Memorandum In Support Of Their Motion For Judgement Notwithstanding The Verdict, Certification To The Oklahoma Supreme Court, A New Trial Or For Remittitur Of Damages, and was reprinted on page 202 of the Appellant's Appendix.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

November 1, 1995 Respectfully submitted,

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